



UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office

Address: COMMISSIONER OF PATENTS AND TRADEMARKS
Washington, D.C. 20231

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.
097043,433	01/07/99	MUNDSCHENK	15050.4.2

PHILIP M GOLDMAN
FREDRIKSON & BYRON
1100 INTERNATIONAL CENTRE
900 2ND AVENUE SOUTH
MINNEAPOLIS MN 55402-3397

HM22/0629

EXAMINER

BAWA, R

ART UNIT	PAPER NUMBER
----------	--------------

1615

DATE MAILED: 06/29/99

Please find below and/or attached an Office communication concerning this application or proceeding.

Commissioner of Patents and Trademarks

Office Action Summary

Application No.

Applicant(s)

Examiner

Group Art Unit

—The MAILING DATE of this communication appears on the cover sheet beneath the correspondence address—

Period for Response

A SHORTENED STATUTORY PERIOD FOR RESPONSE IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a response be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for response specified above is less than thirty (30) days, a response within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for response is specified above, such period shall, by default, expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to respond within the set or extended period for response will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).

Status

- ☐ Responsive to communication(s) filed on _____.
- ☐ This action is **FINAL**.
- ☐ Since this application is in condition for allowance except for formal matters, **prosecution as to the merits is closed** in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 1 1; 453 O.G. 213.

Disposition of Claims

- ☒ Claim(s) 1-20 is/are pending in the application.
- ☐ Of the above claim(s) _____ is/are withdrawn from consideration.
- ☐ Claim(s) _____ is/are allowed.
- ☒ Claim(s) 1-20 is/are rejected.
- ☐ Claim(s) _____ is/are objected to.
- ☐ Claim(s) _____ are subject to restriction or election requirement.

Application Papers

- ☐ See the attached Notice of Draftsperson's Patent Drawing Review, PTO-948.
- ☐ The proposed drawing correction, filed on _____ is ☐ approved ☐ disapproved.
- ☐ The drawing(s) filed on _____ is/are objected to by the Examiner.
- ☐ The specification is objected to by the Examiner.
- ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. § 119 (a)-(d)

- ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).
 - ☐ All ☐ Some* ☐ None of the CERTIFIED copies of the priority documents have been received.
 - ☐ received in Application No. (Series Code/Serial Number) _____.
 - ☐ received in this national stage application from the International Bureau (PCT Rule 1.7.2(a)).

*Certified copies not received: _____

Attachment(s)

- ☒ Information Disclosure Statement(s), PTO-1449, Paper No.(s) _____ ☐ Interview Summary, PTO-413
- ☒ Notice of References Cited, PTO-892 ☐ Notice of Informal Patent Application, PTO-152
- ☐ Notice of Draftsperson's Patent Drawing Review, PTO-948 ☐ Other _____

Office Action Summary

Art Unit: 1615

Detailed Action

(1) The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless --

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-8 and 11-18 are rejected under 35 U.S.C. 102(b) as being anticipated by Jasse et al. (USP 3,976,223).

Jasse et al. explicitly disclose an aerosol dispenser that contains 3% hydrogen peroxide and 0.6% sodium lauryl sulfate (see Example A in columns 7-8; in particular, column 8, lines 48, 54 and 60-68). Consequently, instant claims 1-8 and 11-18 are anticipated by Jasse et al.

(2) The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Art Unit: 1615

Claims 1-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Jasse et al.

Jasse et al. disclose the aerosol delivery of active agents (see column 1, line 66 to column 2, line 6; and column 5, line 23 to column 6, line 65). Hydrogen peroxide with surfactant such as sodium lauryl sulfate is also disclosed (Table I at column 7-8).

The only difference between the claimed invention and the disclosure of Jasse et al. is that Jasse et al. do not expressly disclose the use of purified sea water as the "chemical agent". However, given the status of purified sea water as a well known therapeutic agent (see applicant's admission in description page 3, lines 7-10), its incorporation into Jasse's delivery system for various active agents would have been well within the scope of one of ordinary skill in the art at the time of the invention. The above-mentioned claims are directed towards a composition per se; their future intended (i.e., the method of delivery) use is not at issue from a patentability point of view. No criticality of the concentrations of the ingredients has been established. There is no comparative data of record in this case that (i)

Art Unit: 1615

establishes any unexpected results over the closest prior art; or (ii) presents any improvements over the closest prior art.

Note that: (i) the cited art is analogous because it pertains to the field of the inventor's endeavor and is also reasonably pertinent to the particular problem with which the inventor is involved. *In re Oetiker*, 977 F.2d 1443, 24 U.S.P.Q. 2d 1443 (Fed. Cir. 1992); (ii) a comprising-type language does not exclude other steps, elements or materials. *Cues Inc. Vs Polymer Industries*, U.S.P.Q. 2d 1847 (DC ND GA 1988); (iii) it is well established that the claims are given the broadest interpretation during examination; (iv) a conclusion of obviousness under 35 U.S.C. 103(a) does not require absolute predictability, only a reasonable expectation of success; and (v) references are evaluated by what they suggest to one versed in the art, rather than by their specific disclosure. *In re Bozek*, 163 U.S.P.Q. 545 (CCPA 1969).

In light of the foregoing discussion, the Examiner's ultimate legal conclusion is that the subject matter defined by the claims would have been obvious within the meaning of 35 U.S.C. 103(a).

Art Unit: 1615

(3) This application does not contain an abstract of the disclosure as required by 37 CFR 1.72(b). An abstract on a separate sheet is required.

(4) The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

(5) Any inquiry concerning this communication or earlier communications from the examiner should be directed to Mr. Raj Bawa, Ph.D., whose telephone number is (703) 308-2423. The examiner can normally be reached on Tuesday through Friday from 7:30 AM to 6:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Page, can be reached on (703) 308-2927. The fax phone number for the organization where this application or proceeding is assigned is (703) 305-3592.

Art Unit: 1615

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1235.



**RAJ BAWA, Ph.D.
PRIMARY EXAMINER**

BAWA; aco
June 24, 1999
June 28, 1999